Supreme Court, U. S.
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No. 99-713

IN THE

Supreme Court of the United States

JEROME SMITH,

Petitioner,

v.

BOARD OF TRUSTEES OF THE OKOLONA MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JAMES ARDEN BARNETT, JR.
TACEY CLARK CLAYTON*
MITCHELL, MCNUTT, THREADGILL, SMITH & SAMS, P.A.
Attorneys for the Respondents
105 South Front Street
Post Office Box 7120
Tupelo, Mississippi 38802-7120
(662) 842-3871

* *Counsel of Record*

156421

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING

The following listed persons are parties to the proceeding.

1. Jerome Smith, Petitioner

2. Board of Trustees of the Okolona Municipal Separate School District, W. Howard Gunn, Eddie Brasfield, George Mayfield, William Randle and Lynn Fair, Respondents

3. Gerald Hegan, Respondent

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following two provisions are involved in the instant case:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Am XIV, sec. 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

> purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.

42 U.S.C. § 1983.

MISSTATEMENTS OF FACT IN PETITION FOR WRIT OF CERTIORARI

Petitioner's brief contains several misstatements which must be brought to the Court's attention pursuant to Supreme Court Rule 15.2. First, Petitioner claims on pages 3-4 of his Petition that he was terminated from his position at the Respondent School District in June, 1997 by Respondent Hegan. That is not true. Petitioner had a one-year contract with the Respondent School District which was not renewed by the School District for the 1997-1998 school year. (App. 5a). The non-renewal and termination of contracts of school administrators is governed by the School Employment Procedures Act ("SEPA"), Miss. Code Ann. § 37-9-101 *et seq.* Terminations are treated differently than non-renewals. Termination of an administrator's contract requires "cause," but a non-renewal does not. Miss. Code Ann. §§ 37-9-59 and 37-9-109 (1996, as amended).

Secondly, Petitioner states that the School District was obligated to follow a personnel appraisal procedure when non-renewing his contract and cites page 6a of the Appendix as support for that assertion. Page 13a of the Appendix is a portion of the District Court's opinion setting forth Petitioner's argument in the court below. That opinion does not say that the School District was required or obligated to follow the personnel appraisal procedure.

Third, there has never been a finding that Petitioner's non-renewal was racially motivated as implied by Petitioner on page 4 of the Petition. To the contrary, the district court and the Fifth Circuit both ruled against Petitioner on his claims of racial discrimination. (App. 10a).

STATEMENT OF THE CASE

On July 14, 1997, Petitioner, Jerome Smith filed a Complaint against the Okolona Municipal Separate School District ("School Board"), and its Superintendent charging that the School Board's decision not to renew his one-year contract as a Principal for the 1997-1998 school year was in violation of the Fourteenth Amendment to the United States Constitution. Specifically, Petitioner now claims that he had a property interest in a future contract with the Respondent School District because he claims that the School District did not follow the personnel appraisal system which he contends was adopted by the Respondent School District as its internal policies, practices and procedures.

The issue is whether Petitioner had a property interest in a future contract for the 1997 - 1998 school year sufficient to invoke his claim of a procedural due process violation. Mississippi follows the employment-at-will doctrine, but also has a statutory scheme, SEPA, which details procedures a School District should follow in non-renewing an administrator's contract. Petitioner does not allege a violation of SEPA. Petitioner does not allege that he had entered into a contract with the Respondent School District for the 1997-1998 school year. Instead, he claims a property interest in future employment sufficient to support a claim under 42 U.S.C. § 1983 for a denial of due process because the Respondent School District allegedly did not follow a written system for evaluating employees.

On October 30, 1998, the District Court properly entered an Order granting Summary Judgment to the Respondents on all grounds (App. 4a). On July 26, 1999, the Fifth Circuit filed its opinion affirming the district court's decision. (App. 1a).

The Petition for Writ of Certiorari was docketed on October 26, 1999. Petitioner seeks to appeal what he claims is the Fifth Circuit's decision on Petitioner's claims of denial of due process under the Fourteenth Amendment.

A. Petitioner has no property interest in a future contract of employment with the Respondent School District.

Petitioner claims a violation of his procedural due process rights. The constitutional right to procedural due process arises only when a risk of deprivation of life, liberty or property is implicated. *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). A person has a property interest in a given job only if he or she can establish a legitimate entitlement to or an expectation of continued employment. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699, 33 L. Ed. 2d 570 (1972). Whether such an entitlement or expectancy exists must be determined by reference to state law. *Bishop*, *supra*, at 344, 96 S. Ct at 2077, 48 L. Ed. 2d at 689.

Petitioner claims that he had a property interest in a future employment contract with the School District because the School District did not follow the personnel appraisal system before deciding not to renew his contract for another year. That assertion does not confer property rights upon Petitioner under Mississippi law. Mississippi follows the

traditional employment-at-will doctrine. *See, e.g., Adams v. Institute of Community Services, Inc.*, 727 So.2d 739 (Miss. Ct. App. 1998) (*cert. denied*, April 8, 1999); *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874, 874-875 (Miss. 1981). That means an employee in Mississippi can be terminated by his employer without any cause. *Id.*

As Petitioner indicates, the Mississippi Supreme Court's decision in *Bobbitt v. Orchard, Ltd.*, 603 So.2d 356 (Miss. 1992), carved out an exception to the employment-at-will doctrine where an employer furnishes its employees a detailed manual explaining the rules of employment and setting forth procedures to be followed for disciplinary action. That case has some very defined parameters. There, the court hinged its holding on the facts that the employer used and disseminated the employee handbook; the employee signed an application agreeing to abide by all the rules of The Orchard, and the employer made sure that it gave the employee handbook to all employees. *Id.* at 361. The court also relied on the fact that there was no disclaimer in the handbook telling the employee that the employee handbook did not affect the employer's right to terminate the employee at will. *Id.* at 362. Even in that precisely defined situation, the court noted that an employee handbook "did not give the employees 'tenure,' or create a right to employment for any definite length of time, but it did create an obligation on the part of The Orchard to follow its provisions in remanding, suspending or discharging an employee for infractions specifically covered therein." *Id.* at 362.

That exception to the employment-at-will doctrine does not extend to Petitioner's situation where there is no allegation that the Respondent School District used the personnel appraisal system or disseminated the personnel

appraisal system or that Petitioner relied on the personnel appraisal system. Petitioner had a right to a hearing under SEPA of which he availed himself. (App. 5a). Once the School District had allowed Petitioner to be heard at the non-renewal hearing and there was a finding that the non-renewal was not done in violation of Petitioner's constitutional rights, Petitioner only had the rights of any employee-at-will in Mississippi. *Jones v. Birdsong*, 530 F. Supp. 221 (N.D. Miss. 1980), *aff'd*, 679 F.2d 24 (5th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983). SEPA does not create a duty of the School District to demonstrate good cause for non-renewals. *Calhoun County Board of Education v. Hamblin*, 360 So.2d 1236, 1240 (Miss. 1978).

A careful analysis of each case cited by Petitioner as support for his theory makes it evident that none of them stand for Petitioner's legal proposition that he had a property interest in a future employment contract with the Respondent School District. First, Mississippi law governs that issue. *Bishop, supra*. Second, the *Whitfield v. Finn*, 731 F.2d 1506 (11th Cir. 1984), decision of the Eleventh Circuit certainly is distinguishable from the instant case. In *Finn*, the court simply said that summary judgment was inappropriate because Plaintiff had stated enough facts to show a questionable issue of fact on whether or not Plaintiff could be terminated from his job as a police officer for any reason or whether the termination could only be "for cause." The court relied on the fact that the police department had published a regulation and made each police officer sign the regulation saying that they understood it. The regulation provided for a six month probationary employment where an officer could be terminated without cause. The court held that the remainder of the publication created a factual issue on whether or not a police officer could be terminated without cause. *Id.* at 1508-09.

The Second Circuit faced a similar issue in *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847 (2d Cir. 1985). There, the court determined that the seniority clause in an employee manual was controlling on the employer and specifically noted that the employees had received "repeated oral and written assurances from the employer that the Operations Manual contained the terms and conditions of employment and was controlling." *Id.* at 852.

The Tenth Circuit's decision in *Jackson v. Integra, Inc.*, 952 F.2d 1260 (10th Cir. 1991), simply states that an employee manual **can** create an implied contract if the circumstances warrant, but did not hold that the employee manual in question did create a contract.

Other cases cited by Petitioner in support of his argument result in a conclusion opposite the one Petitioner urges this court to reach. *See, e.g., Wallace v. Shreve Mem. Library*, 79 F.3d 427, 431 (5th Cir. 1996) (employment manual did not constitute an employment contract sufficient to create a property interest in employment for purposes of the Fourteenth Amendment to the United States Constitution); *McIlravy v. Kerr-McGee Corp.*, 74 F.3d 1017, 1022-25 (10th Cir. 1996), (employee handbook did not grant a contractual right to employees to have lay-offs determined by seniority); *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1407-09 (7th Cir. 1994), (an employee handbook which contained an express disclaimer did not create a property interest in the employment sufficient to state a claim under the procedural due process of clause of the Fourteenth Amendment); *Mix v. University of New Orleans*, 609 So.2d 958 (La. Ct. App. 4th Cir. 1992) (a grievance procedure created no contractual rights in favor of an employee); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309 (6th Cir. 1989),

(the court refused to adopt plaintiff's reasoning that the provisions in an employee handbook setting forth the reasons the employer could terminate an employee without warning did not modify the employee-at-will relationship sufficient to constitute a breach of contract claim); *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 360 (8th Cir. 1987), (an employer's failure to follow its written lay-off guidelines did not constitute a breach of contract when Missouri followed the employment-at-will doctrine).

The Fifth Circuit's decision in *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914 (1983), is simply not applicable to the issues at hand as that case was brought under Section 3 of The Labor Management Relations Act of 1947. *Id.* at 915.

In *Qualls v. Hickory Springs Mfg. Co.*, 994 F.2d 505 (8th Cir.), *rehearing denied en banc*, 1993 U.S. App. LEXIS 17137 (1993), the court was faced with the issue of a breach of contract claim because it terminated an employee who failed a drug test. There was no constitutional claim. There, the employees had received a manual stating that a positive drug test could result in termination, but were told by their supervisors that they would not be terminated for a positive test result, but would only be terminated for refusing to submit to the test. The Eighth Circuit concluded that the plaintiff had presented enough proof to go forward on a breach of contract claim under Arkansas law because of what the employees had been told about the drug testing policy.

The situation in this case is dramatically different from the situation in *Bobbitt* and the other cases cited by Petitioner. There is no evidence that a written document was given to Petitioner which told him that the personnel appraisal system had to be followed before the Superintendent could

recommend the non-renewal of Petitioner's contract. The record is completely devoid of any proof that such information was distributed to or relied upon by Petitioner. The facts of this situation simply do not create contractual obligations for the School District and do not grant Petitioner a property interest in a future contract with the School District. Petitioner was an employee-at-will. Consequently, Plaintiff has no procedural due process rights and, therefore, no due process claim.

B. The record cannot support Petitioner's claim.

Petitioner argues that he is entitled to relief because Superintendent Hegan did not follow the personnel appraisal system which was adopted by the School Board before he recommended the non-renewal of his contract. First, there is nothing whatsoever in the record (or in Petitioner's argument) to inform the Court of what the personnel appraisal system is; what it requires; who has or has not adopted it; whether it was disseminated to Petitioner and whether it has been followed at all or followed in this situation. There is no document or testimony claiming that Petitioner ever knew that the School Board had adopted the personnel appraisal system or that Petitioner relied on any such personnel appraisal system. Assuming *arguendo* that the School Board had adopted such a system, what did it require? Did Superintendent Hegan did not follow the exact letter of the personnel appraisal system in not recommending the renewal of Petitioner's contract? Assuming *arguendo* again, did Superintendent Hegan's conduct give rise to a constitutional cause of action? We do not know because Petitioner does not tell us.

Appellant does not and cannot cite to any authority which converts the personnel appraisal system into a property interest. The personnel appraisal process is merely an internal guideline for performing evaluations of personnel - nothing more and nothing less. It is not the law — that's why it is not included in the statutory scheme of the School Employment Procedures Act, Miss Code Ann. § 37-9-101 *et seq.*, which deals extensively with the non-renewal of school administrators' employment contracts. A violation of one's policies, practices or procedures does not bestow a property right upon an employee, particularly when that employee cannot show any knowledge of or reliance on such policies, practices or procedures.

C. Petitioner should not be allowed to argue a new theory of relief on appeal.

Petitioner did not argue to the trial court or to the Fifth Circuit Court of Appeals that Petitioner's property rights under 42 U.S.C. § 1983 were violated. Petitioner's Statement of Issues presented to the Fifth Circuit is quoted in full below:

STATEMENT OF ISSUES

1. Did the District Court err in granting Summary Judgment to Defendants-Appellees on the grounds that Plaintiff-Appellant could have been a victim of racial discrimination?

2. Did the District Court err in granting a Summary Judgment to Defendants-Appellees on the issue of whether his contract rights were violated?

3. Did the District Court err in granting Summary Judgment on the issue of whether Plaintiff-Appellant rights were violated under Section 37-9-111 of the Miss. Code of 1972, as Amended?

Petitioner did not mention a procedural due process claim. Instead, he argued a breach of contract claim. He should not be allowed to change his theories of his case at this late stage of the game. This Court has consistently refused to entertain petitions alleging a new theory of relief not presented to the courts below. *See e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, 90 S. Ct. 1598, 26 L. Ed. 2d 142, 147, n.2 (1970); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 101 S. Ct. 1146, 67 L. Ed. 2d 287, 298. The Court should do likewise in this situation.

REASONS FOR DENYING THE WRIT

Petitioner claims that the Writ should be granted because the Fifth Circuit's opinion conflicts with rulings from several other circuits and that the conflicts call for a resolution by this Court. That is not correct. The law on this issue has already been decided by this Honorable Court. Whether a property interest in employment exists sufficient to trigger the procedural due process clause of the Fourteenth Amendment is determined by state law. *Bishop, supra*. There is simply no conflict for the Court to resolve.

Another reason for granting the Writ, according to Petitioner, is because the Fifth Circuit's decision conflicts with other decisions the Fifth Circuit has rendered. As the above cases illustrate, that assertion, too, is inaccurate. The Fifth Circuit's decision is in conformity with its previous decisions. Petitioner does not cite the Court to one decision

where the Fifth Circuit has rendered a conflicting decision. The *Smith v. Kerrville* and *Wallace v. Shreve Memorial Library* cases, *supra*, are certainly not in conflict with the instant decision as discussed above.

The last reason given by Petitioner is his perception that the Court below disregarded his property rights under 42 U.S.C. § 1983. First, that statute grants no property rights, but merely supplies a judicial vehicle for remedying rights granted by some other law or constitutional provision. In any event, the Court below did not rule on a procedural due process claim because such a claim was not presented by Petitioner as discussed above.

None of the reasons given by Petitioner are compelling reasons for the grant of a Writ. This is not a case for the Court to use its judicial discretion to grant the Writ — the issue is not one worthy of review under Supreme Court Rule 10.

CONCLUSION

There is no viable constitutional claim as discussed above. Petitioner is asking this court to hold that the internal policies of a School Board create a property interest in employment under Mississippi whether or not Petitioner is aware of those internal policies. Such is not the current state of the law in Mississippi, nor should it be.

The district court was correct in granting summary judgment on all claims and the Fifth Circuit Court of Appeals was correct in upholding the summary judgment. The petition to this Honorable Court should be denied.

Respectfully submitted,

JAMES ARDEN BARNETT, JR.
TACEY CLARK CLAYTON*
MITCHELL, MCNUTT, THREADGILL,
SMITH & SAMS, P.A.
Attorneys for the Respondents
105 South Front Street
Post Office Box 7120
Tupelo, Mississippi 38802-7120
(662) 842-3871

* *Counsel of Record*